STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

SHERITA WHITE and DERRICK WHITE,

Plaintiffs-Appellees,

v

TAYLOR DISTRIBUTING COMPANY, INC., PENSKE TRUCK LEASING COMPANY, L.P., and JAMES J. BIRKENHEUER,

Defendants-Appellants.

Supreme Court No. 134751

Court of Appeals No.: 272114
(Markey, P.J. and Murphy, J.; Kirsten Frank Kelly J., dissenting)

Oakland Circuit Court
LC No.: 2005-064307 -NI
Hon. Deborah G. Tyner

DEFENDANTS-APPELLANTS' REPLY BRIEF ON PLENARY APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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DEFENDANTS-APPELLANTS' REPLY BRIEF ON PLENARY APPEAL

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I. PLAINTIFFS' PRIMARY ARGUMENT IN FAVOR OF THEIR INTERPRETATION OF MCR 2.116(G)(4) IS A FLAWED CONSTRUCTION OF A FEDERAL COURT RULE INSTEAD OF AN ANALYSIS OF THE PLAIN LANGUAGE OF THE MICHIGAN COURT RULE AT ISSUE. PLAINTIFFS' VIEW OF THE FEDERAL RULE IS ALSO INCORRECT, IN ANY EVENT.

Federal Courts do not allow nonmovants to dodge their FRCP 56 Summary Judgment proof burdens by making accusations without any real evidence that the opposing witness is lying, which is precisely what Plaintiffs are trying to do here. The "if appropriate" exception of MCR 2.116(G)(4) Plaintiffs advance is not applied when the non-moving party merely announces that a witness is interested or motivated to lie; rather, wholly consistent with Michigan precedent on this issue, there must be some sort of evidentiary basis advanced for calling into question a witness' credibility. Wright v Murray Guard, Inc', 455 F3d 702 (CA6 2006); see also, Schoonejongen v Curtiss-Wright Corp, 143 F3d 120, 129-130 (CA3 1998) (holding that there must at least be some circumstantial evidence to call into question the intent or credibility of the opposing witness). There, the Third Circuit ruled:

> On the other hand, certain scenarios may arise where a material fact cannot be resolved without weighing the credibility of a particular witness or individual-such as when the defendant's liability turns on an individual's state of mind **and the plaintiff has presented circumstantial evidence** probative of intent. [Id. (Emphasis added).]

This presentation of contrary "circumstantial evidence" is utterly lacking here. The fact that Mr. Birkenheuer was an employee for the other Defendants does not, in and of itself, create a jury submissible issue of witness credibility. McCart v J Walter Thompson USA, Inc, 437 Mich 109; 469 NW2d 284 (1991) (holding that the plaintiff's promise to show that the defendant's rationale for discharging him was a lie was insufficient to avoid summary disposition); Thiede v Raytheon Co', 2002 WL 1040400 (Mich App 2002) (Exhibit 1); Sandstad v CB Richard Ellis Co, 309 F3d 893, 898 (CA5 2002) (holding that to allow a credibility challenge to be based solely on the basis of an employment relationship "would foreclose the possibility of summary judgment for

employers, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken."); Stanley v Hancock County Comm'rs, 864 A2d 169, 178 (Me 2004) ("the presence of the issue of motivation [to lie] or intent does not relieve the plaintiff of her or his burden of producing evidence sufficient to create a question of fact on that issue.")

The Third Circuit in Schoonejongen repeatedly notes the requirement that the credibility attack, at a bare minimum, must be based upon circumstantial evidence, reaffirming this vital rule no less than three times. 143 F3d at 130 (holding that defeating a Rule 56 motion with credibility concerns requires "sufficiently powerful countervailing circumstantial **evidence**.") ("if a moving party has demonstrated the absence of a genuine issue of material fact–meaning that no reasonable jury could find in the nonmoving party's favor based on the record as a whole–**concerns regarding the credibility of witnesses cannot defeat summary judgment.**") ("Thus, summary judgment is particularly appropriate where**, notwithstanding issues of credibility**, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor.") (Emphasis added.)

Federal court treatment of Rule 56 may pose some scholarly interest, but it is completely unnecessary for the jurisprudence of *this* State. As explained in our Principal Brief on Appeal, MCR 2.116(G)(4) is unambiguous and can, must actually, be applied as written without resort to persuasive, but ultimately non-binding, federal authorities. In re KH, 469 Mich 621, 628, 677 NW2d 800 (2004); DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). The interpretative analysis set forth in our Principal Brief need not be parroted here.

This Court ought not to rely on federal analogies to construe otherwise unambiguous Michigan statutes or court rules. Garg v Macomb County Community Mental Health Services, 472 Mich 263, 282-283; 696 NW2d 646 (2005); see also, Lind v Battle Creek, 470 Mich 230; 681 NW2d 334 (2004) (rejecting federal interpretation of analogous federal statute when

interpreting Michigan's discrimination law). Quite simply, there is no need to look past the words of MCR 2.116(G)(4) and, even looking past those words, such an endeavor does not advance Plaintiffs' cause, as explained above.

II. WHETHER DEEMED PRIMA FACIE PROOF OR A REBUTTABLE PRESUMPTION, ONCE PLAINTIFFS HAVE BEEN MET WITH REBUTTAL EVIDENCE, THE PLAINTIFF MUST COME FORWARD WITH ACTUAL CONTRARY EVIDENCE TO SUSTAIN HIS OR HER BURDEN OF PROOF AT THE SUMMARY DISPOSITION STAGE.

Plaintiffs' Brief on Full Calender Appeal seeks to undo the progress made by the trilogy of important cases announced by the Court in Skinner v Square D, 445 Mich 153; 516 NW2d 475 (1994), Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999), and Smith v Globe Ins Co, 460 Mich 446; 597 NW2d 28 (1999). That progress is the global imposition of a requirement that the nonmovant on Summary Disposition come forward with real evidence, not just recitals and pleadings. No longer is the promise of future evidence sufficient. Plaintiffs' promise of future credibility attacks on Mr. Birkenheuer does not comply with the policy change reflected by these cases.

Plaintiffs' first argument in their brief on appeal raises an issue of semantics, an unpersuasive one at that, in seeking to recast the entire appeal based on their interpretation of MCL 257.402(a) as creating a "prima facie" case of negligence as opposed to a rebuttable presumption of negligence. Plaintiffs' view is directly contrary to decades of case law flatly rejecting their interpretation, but, even somehow accepting their view as true, in the end, the treatment of MCL 257.402(a) as a prima facie showing of negligence makes utterly no difference at all, as the two concepts are juridically interchangeable.

A. Michigan Courts Have Historically Construed Statutory Prima Facie Language As Creating A Rebuttable Presumption

The Michigan Court of Appeals succinctly held, "[t]he term 'prima facie proof' denotes a rebuttable presumption in the law." Raptis v Safeguard Ins' Co', 13 Mich App 193, 199; 163

NW2d 835 (1969); see also, American Ca' Co' v Costello, 174 Mich App 1, 7; 435 NW2d 760 (1989) ("Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption."); see also, Herald Wholesale, Inc v Dep't of Treasury, 262 Mich App 688; 687 NW2d 172 (2004) (statutory language providing for a prima facie showing deemed a rebuttable presumption).

Justice Kelly herself followed this approach while sitting on the Court of Appeals when construing a statute providing that an insurer's mailing of a cancellation notice is prima facie proof of notice to the insured; procedurally speaking, Justice Kelly ruled that the mailing of the notice creates a rebuttable presumption that the insured received the cancellation notice. State Farm Mut' Auto' Ins' Co' v Allen, 191 Mich App 18; 477 NW2d 445 (1991).

B. The Prima Facie Language Of MCL 257.402(a) Has Always Been Construed As Creating A Rebuttable Presumption

From the very start, the prima facie nature of MCL 257.402(a) has always been treated as the equivalent of a rebuttable presumption. See Gordon v Hartwick, 325 Mich 534, 541; 39 NW2d 61 (1949) ("The fact that the collision was a rear-end collision is **presumptive** evidence of negligence on the part of the driver of the following car.") (Emphasis added.); Corbin v Yellow Cab Co, 349 Mich 434; 84 NW2d 775 (1957) ("prima facie presumption"); Linabery v LaVasseur, 359 Mich 122; 101 NW2d 388 (1960); Petrosky v Dziurman, 367 Mich 539; 116 NW2d 748 (1962) (statutory presumption of negligence). These cases interchangeably refer to MCL 257.402(a) as creating a "prima facie" case of negligence, a rebuttable presumption of negligence, a rebuttable prima facie showing of negligence, etc. The definition of "prima facie," according to Black's Law Dictionary, shows that Plaintiffs' semantic argument is a distinction without a difference by defining "prima facie" as: "At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; **presumably**; a fact **presumed** to be true **unless disproved by some evidence to the contrary**." (Emphasis added.)

This duality is completely unsurprising, given that in other contexts as well and under different statutory schemes, Michigan Courts routinely elicit a rebuttable presumption from a statute creating a prima facie showing. Longstreth v Gensel, 423 Mich 675; 377 NW2d 804 (1985) (violation of a penal statute creates a prima facie showing of negligence and is treated as a rebuttable presumption); Johnson v Austin, 406 Mich 420; 280 NW2d 9 (1979) (a driver's flight from the scene gives rise to a rebuttable presumption and a prima facie showing of negligence); Koopman v Logan, 93 Mich App 252; 286 NW2d 872 (1980) (mailing of a notice of cancellation of an insurance policy creates a rebuttable presumption).

C. Whether Deemed Prima Facie Proof Or Rebuttable Presumption, The Procedural Device Bears No Evidentiary Weight Once Rebutted

Getting past the angels-on-pins definitional argument Plaintiffs raise, whether the operation of MCL 257.402 is deemed a prima facie showing of negligence or a rebuttable presumption, this distinction without a difference does not matter as under either circumstance, when the prima facie showing or the presumption is rebutted with competent and credible evidence, it drops out of the case. This is so because the procedural device in both instances dissolves and the plaintiff must look elsewhere with real evidence to sustain her burden of proof. See Pence v Wessels, 320 Mich 195; 30 NW2d 834 (1948); Allstaedt v Ochs, 302 Mich 232; 4 NW2d 530 (1942); Manufacturers Nat Bank v Schirmer, 303 Mich 598; 6 NW2d 908 (1942); Mitts v Williams, 319 Mich 417; 29 NW2d 841 (1947). The Pence decision from this Michigan Supreme Court holds:

> A rebuttable **OR** prima facie presumption **has no weight as evidence**; it may establish a prima facie case, but, if challenged by rebutting evidence, the presumption cannot be weighed against the evidence, and upon introduction of supporting evidence, **the actual evidence introduced is then weighed without giving any evidential force to the presumption itself**. [Pence, supra, 320 Mich 199-200, citing Hill v Harston (Syllabus), 299 Mich 672; 1 NW2d 34 (1941) (emphasis added).]

In Gillett v Michigan United Traction Co, 205 Mich 410, 414; 171 NW 536 (1919), this Court

held that rebuttable presumptions and a prima facie showing are virtually identical and legally treated in the same exact manner when faced with contrary proofs: "It is now quite generally held by the courts that a rebuttable **or** prima facie presumption has no weight as evidence." (Emphasis added.) Expanding upon this principle, the Court further ruled:

> It serves to establish a prima facie case; but, if challenged by rebutting evidence, **the presumption cannot be weighed against the evidence**. Supporting evidence **must be introduced**, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself. In Elliott on Evidence, vol. 1, § 91, p. 114, it is said:
>
> ***
>
> "A presumption operates to relieve the party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a prima facie case until the other party has gone forward with his evidence, but, in itself, it is not evidence, and involves no rule as to the weight of evidence necessary to meet it. * * * It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, **and a presumption, being a legal rule or a legal conclusion, is not evidence**." [Id. at 414-415 (emphasis added) (internal citations omitted).]

The Court of Appeals succinctly refuted the exact proposition offered by Plaintiffs, i.e., that creation of a prima facie case mandates submission of the case to a jury, in another context, holding: "'Prima Facie case' in this context does not mean that the plaintiff produced sufficient evidence to allow the case to go to a jury, but rather that the plaintiff produced enough evidence to create a rebuttable presumption of age discrimination." Meagher v Wayne State University, 222 Mich App 700, 710-711; 565 NW2d 401 (1997), lv denied 457 Mich 874 (1998). This argument that a Prima Facie case **always** gets the case to the Jury (as Plaintiffs posit) is simply not a correct view of the law under Meagher, supra.

Also consider the intermingling of the phrases in Guardian Industries, Corp v Dept of Treasury, 243 Mich App 244, 621 NW2d 450 (2000). There, relying on Michigan Supreme Court precedent, the Court of Appeals ruled: "Presumptions are merely prima facie precepts or inferences from the existence or non-existence of facts and disappear if, and when, evidence is introduced from which facts may be found. Accordingly, the presumption is not applicable to

the facts of this case, it having dissolved after the expiration the 90-day period." See also, Mich' Aero Club v Shelley, 283 Mich 401, 410; 278 NW2d 121 (1938) ("Presumptions are frequently misapplied. They are merely prima facie precepts.") Quite simply, whether phrased as a prima facie showing or a rebuttable presumption, the procedural device establishing a temporary showing of negligence is completely negated when confronted with actual evidence, which, undoubtedly, a prima facie showing is not. See also, Krisher, supra.

III. A REBUTTED PRESUMPTION OR PRIMA FACIE SHOWING IS NOT EVIDENCE. THEREFORE, THESE DEVICES ARE INSUFFICIENT TO DEFEAT A PROPERLY SUPPORTED MOTION FOR SUMMARY DISPOSITION.

Getting past the definitional dispute, the major disagreement between the parties concerns the evidentiary force vel non of a destroyed presumption at the summary disposition stage. Very few, if any, cases actually decide this question, primarily because most litigants are serious about litigating the case and bring forward more supporting evidence than simple reliance on a presumption, such additional evidence causes a trial on existing evidence.

Here, Plaintiffs argue that even if "the mandatory inference of negligence disappears, the case, however, still goes to the jury because they are permitted to draw an inference of negligence from the underlying fact of the rear-end collision." (Plaintiffs' Brief, p 9.) This advocated rule of law has been rejected on numerous occasions, including Meagher, supra, McCart, supra, and Barnell, supra. Additionally, the Krisher decision stands for the exact proposition we urge this Court to adopt. "It has been held that uncontradicted evidence alone is sufficiently clear, positive and credible to rebut the presumption **and justify a directed verdict for the defendant**." Krisher v Duff, 331 Mich 699, 710; 50 NW2d 332 (1951) (Emphasis added.); see also, Patt v Dilley, 273 Mich 601, 606; 263 NW 749 (1935).

Plaintiffs' view that a prima facie/rebuttable presumption makes an irrebuttable "bulletproof" case for the jury was also rejected in Hill v Hairston, 299 Mich 672; 1 NW2d 34

(1941). There, this Michigan Supreme Court decided this specific question by holding that the plaintiff failed to sustain his burden of undue influence because there was no other supporting evidence, other than reliance upon a rebutted presumption, to support the claim. Id. at 680.

This is significant in the additional respect that, even if Plaintiff's current view of the statute is correct, that view is inadequate in analysis because a rebutted prima facie showing is likewise insufficient to sustain the Plaintiff's ultimate burden of proof once challenged by real evidence. See also, Barnell v Taubman Co, Inc, 203 Mich App 110; 512 NW2d 13 (1993) (holding that a rebutted prima facie showing, alone, is insufficient to sustain the plaintiff's evidentiary burden); see also, McCart, supra.

A. Analogous Cases In The Employment Discrimination Context Establish That A Prima Facie Showing, Alone, Is Insufficient To Avoid Summary Disposition

As set forth in our Principal Brief on Appeal, the analytic framework established for employment discrimination cases provides a very useful analogous model for this case -- and for the whole jurisprudence of our State. There, if the Plaintiff's prima facie showing of unlawful discrimination is met with the Defendant's rebuttal proofs, to succeed, the Plaintiffs must thereafter come forward with additional supporting evidence to counter the rebuttal proofs. See, for example, Lytle v Malady (On Rehearing), 458 Mich 153, 173-174; 579 NW2d 906 (1998); Hall v McRea Corp, 238 Mich App 361, 370; 605 NW2d 354 (1999). This is juridically the same rule announced earlier in Krisher, supra and Hill, supra. This is ultimately critical because this destroys Plaintiffs' contention that once a prima facie showing is rebutted, an inference of negligence remains, like a stubborn radioactive half-life. But this is not so in the discrimination context. Once the presumption is rebutted, the possibility of inferring discrimination is wholly insufficient to avoid summary disposition when met with positive rebuttal proofs. McCart, supra; Meagher, supra; Barnell, supra. This central flaw in Plaintiffs' argument cannot be

remedied: If this were not a rear end accident case but an Employment Discrimination case, Plaintiffs indisputably would be unable to get to the jury. Are the myriad of civil presumptions in all cases to be elevated above, say, race discrimination so that the rebuttable presumptions in discrimination cases are in a singular, exalted enclave where rebuttal evidence displaces the prima facie presumption but only in those civil cases? This clarity in the employment realm needs to be reflected here, as well, for the law as a whole.

If the employment discrimination plaintiff fails to come forward with evidence, even after creating a prima facie showing of unlawful discrimination, the rebuttal proofs prevail and the plaintiff's case must be dismissed. Lytle, supra; Barnell v Taubman Co, Inc, 203 Mich App 110; 512 NW2d 13 (1993). In Barnell, in fact, the Court of Appeals specifically ruled that it was insufficient for that age discrimination plaintiff to simply rely on the prima facie showing of discrimination once the defendant came forward with rebuttal proofs. "Plaintiff has offered no other evidence that age was a determining factor for his discharge. Plaintiff's replacement by a younger employee [the prima facie showing], without more, is insufficient to support a claim of age discrimination." Barnell, supra, 203 Mich App 121-122.

Plaintiffs interpret their case law as indicating that a presumption, once rebutted, may be sufficient to persuade a trier of fact. It bears repeating, however, that in those cases, the plaintiff came forward with more than simply a presumption; there the plaintiffs came forth with additional supporting evidence beyond the presumption. This critical fact makes reliance on Widmayer much less compelling because there, the plaintiff, in addition to the presumption, also produced "substantial record testimony." Widmayer v Leonard, 422 Mich 280, 283-284; 373 NW2d 538 (1985) was not a case of a plaintiff with noting more than a presumption. This is.

But, when the plaintiff failed to introduce any evidence on top of the presumption: when met with rebuttal proofs, the presumption disappeared and the case was dismissed. Hill, supra

(undue influence assertion failed as a matter of law when nothing more demonstrated than a rebutted presumption); McCart, supra (once prima facie showing was rebutted, the plaintiff had to come forward with other supportive evidence to avoid summary disposition); Barnell, supra (prima facie showing of discrimination insufficient to sustain burden once rebutted). These very important rules should apply here, even with a statutory presumption at play.

This is the precise rule announced in Lytle, supra.

> Once the defendant produces such [rebuttal] evidence, **even if later refuted or disbelieved**, the presumption drops away, and the burden of proof shifts back to plaintiff. At this third stage of proof, **in this case in response to the motion for summary disposition**, plaintiff had to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. [Lytle v Malady, 458 Mich 153, 174; 579 NW2d 906 (1998) (emphasis added).]

Why should this not be the rule for all civil cases? Quite simply, once the "presumption" dissolves, the plaintiff has to come forward with something else, otherwise, there are no triable issues of material fact. This is clear from all of the case law, even Widmayer. "**We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof.**" Id., at 288-289 (emphasis added); See also, Ward v Consolidated Rail Corp, 472 Mich 77, 85; 693 NW2d 366 (2005) ("Once defendant presented this [rebuttal] evidence, the initial presumption dissolved and, at best, the fact-finder was left with **the possibility** of considering the underlying inferences.") (Emphasis added.) But Ward did not explore how a Jury can be instructed on the presumption, since there is no other supporting evidence: What evidence, exactly, from Plaintiffs will the jurors be instructed on? Would Plaintiffs' liability case be anything more than a cross examination of Mr. Birkenheuer? These actions where the plaintiff's entire case depends on proving that the defendant is lying are prohibited in Michigan as McCart, supra, clearly holds. The troubling -- yes, infuriating -- language in Widmayer overlooks that the Court noted there that there was additional evidence or there could

only be an instruction on the evidence in those cases Plaintiff must adduce. There is no such evidence here.

Ward illustrates the fundamental problem with Plaintiffs' position; a destroyed presumption leaves only the "**possibility**" of considering the underlying inference flowing from the presumption. But a liability theory resting upon a **possibility**, without more, is insufficient to defeat summary disposition. "Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he 'sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.' A valid theory of causation, therefore, must be based on facts in evidence." Craig v Oakwood Hosp, 471 Mich 67, 87; 684 NW2d 296 (2004). It is insufficient "to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." Skinner v Square D Co, 445 Mich 153, 164; 516 NW2d 475 (1994).

IV. UNCONTRADICTED REBUTTAL EVIDENCE DESTROYS THE PRESUMPTION, EVEN UNDER THE HEIGHTENED STANDARD ADVANCED BY PLAINTIFFS.[1]

Lastly, Plaintiffs' characterization of Defendants' rebuttal proofs as insufficient to dissolve the presumption is flat wrong. The evidence spelled out more fully in our Principal Brief on Appeal went uncontradicted; plaintiff offered no evidence to counter Mr. Birkenheuer's version of the events nor the medical testimony. These facts meet even the elevated burden for rebuttal proofs. Krisher significantly holds: "It has been held that **uncontradicted** evidence

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[1] Note that Defendants still maintain that only clear and competent evidence is needed to rebut a presumption, as argued in our Principal Brief on Appeal. We rely on the argument previously made. Instead of repeating ourselves, we insist that even under the heightened standard of proof urged by Plaintiffs, the presumption here was still destroyed.

alone is sufficiently clear, positive and credible to rebut the presumption and **justify a directed verdict for the defendant**." Krisher, supra 331 Mich at 710 (emphasis added).

Rather than come forward with evidence to call into question Defendants' rebuttal proofs, Plaintiffs merely claimed that Mr. Birkenheuer's might be lying, because he is an active Defendant and employed by another Defendant. Arguing credibility without any evidentiary support, circumstantial evidence even, is not enough. McCart, supra made this principle abundantly clear when applying MCR 2.116(G)(4). Even the federal case law Plaintiffs so heavily rely upon uniformly reject this notion, where the testimony in support of summary judgment comes from an interested party or a defendant. See Fuentes v Perskie, 32 F3d 759, 765 (CA3 1994) (in order to survive summary judgment with a credibility attack, the plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's preferred legitimate reason for its action that a reasonable factfinder *could* rationally find them unworthy of credence . . . ."); Wright v Murray Guard, Inc', 455 F3d 702 (CA6 2006) (accusing the opponent of lying is not evidence sufficient to defeat summary judgment); Gribcheck v Runyon, 245 F3d 547 (CA6 2001); Peters v Lincoln Elec' Co', 285 F3d 456 (CA6 2002).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, Defendants-Appellants respectfully pray that the decision of the Court of Appeals be vacated and the decision of the Trial Court granting Summary Disposition be reinstated together with all costs of appeal.

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Dated: February 27, 2008

C
Thiede v. Raytheon Co.
Mich.App.,2002.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Edward F. THIEDE, Jr., Plaintiff-Appellant,
v.
RAYTHEON COMPANY, d/b/a Raytheon Systems Company, and Joanne L. Saunders, Defendants-Appellees.
No. 225820.

May 21, 2002.

Before: HOOD, P.J., and GAGE and MURRAY, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right from the trial court's opinion and order granting defendants summary disposition of his breach of contract, wrongful discharge and employment discrimination claims pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff contends that the trial court erred in granting defendants summary disposition because genuine issues of material fact existed regarding his claims. We review de novo a trial court's summary disposition ruling. In reviewing a motion brought under subrule MCR 2.116(C)(10), this Court considers the pleadings and relevant documentary evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial, or whether the moving party is entitled to judgment as a matter of law. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337;572 NW2d 201 (1998).

Plaintiff first argues that he presented evidence to support his claim that defendant Raytheon Company breached a contract. Plaintiff suggests that when the company hired him, as chief operating officer of a company division called Systems Engineering and Manufacturing Systems (SEAMS), it had promised to promote him to the position of division president when the existing president retired. Any valid contract, oral or written, must consist of an offer and an acceptance. The acceptance must be unambiguous and in strict conformance with the terms of the offer. If an offer requires no specific form of acceptance, acceptance may be implied from the offeree's conduct. *Pakideh v Franklin Commercial Mortgage Group, Inc,* 213 Mich.App 636, 640;540 NW2d 777 (1995).

Plaintiff did not present evidence that the company made any actual offer. Plaintiff merely pointed to statements made by the president of his division that plaintiff "would be in a position" to assume the division presidency when the president retired, and to similar statements made by company executives. These statements fall short of an offer, instead appearing as discussions of future possibilities that might come to pass. In light of the insufficient evidence of any offer, we conclude that the trial court properly granted summary disposition of plaintiff's breach of contract claim pursuant to MCR 2.116(C)(10).

Plaintiff also asserts that his termination was wrongful because his position was subject to termination only for just cause. The presumption of employment at will may be overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. A plaintiff may prove such contractual terms by showing (1) an express agreement, either written or oral, regarding job security that is clear and unequivocal, or (2) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. In reviewing a legitimate expectation claim, a court first must consider what,

if anything, the employer has promised, then determine whether the promise is reasonably capable of instilling a legitimate expectation of just cause employment. *Lytle v. Malady (On Rehearing),* 458 Mich. 153, 164-165;579 NW2d 906 (1998).

*2 We find that plaintiff failed to present evidence of a clear and unequivocal oral promise of just cause employment. The one oral promise on which plaintiff relies-that the company agreed to pay plaintiff's expenses for relocating from Connecticut to Michigan, provided that he did so within three years, and that until plaintiff moved the company would reimburse his commuting expenses-did not constitute a clear and unequivocal promise that he would have just cause employment, either during those three years or at any other time. The promise only addressed what the company would do to ease the financial burden involved in plaintiff's acceptance of a job in another state, and had nothing to do with the terms of plaintiff's employment in the position.

Furthermore, the fact that Raytheon had personnel policies generally promising to treat employees fairly does not give rise to any legitimate expectation of just cause employment. Even assuming that plaintiff had at least constructive awareness of these policies during the time of his employment, *Prysak v. R L Polk Co,* 193 Mich.App 1, 7;483 NW2d 629 (1992), the policies were too vague to give rise to legitimate expectations of just cause employment. *Lytle, supra* at 165-166 ("A lack of specificity of policy terms or provisions ... is grounds to defeat any claim that a recognizable promise in fact has been made."), citing *Rood v. General Dynamics Corp,* 444 Mich. 107, 139;507 NW2d 591 (1993).

Plaintiff also suggests that the existence of an "employee problem resolution procedure" and a related arbitration agreement between himself and his employer was evidence of his just cause employment. We note, however, that the arbitration agreement, which is comprehensive, gives examples of several matters that may be arbitrated. These examples, such as discrimination and tort claims, do not depend for their viability on a just cause employment relationship. Moreover, the arbitration agreement explicitly disclaims that it creates contractual rights or changes the nature of the employment relationship. See *Lytle, supra* at 166 (observing that policy language that disclaims a contract "[a]t the very least ... renders [any] 'proper cause' statement too vague and indefinite to constitute a promise").

Lastly with respect to the wrongful discharge issue, we observe that in filling out his application for employment plaintiff was put on notice that his employment relationship would be at will, and signed an acknowledgement of this fact. This factor alone is sufficient to defeat plaintiff's claim that a jury question existed regarding whether he had just cause employment status. *Rowe v. Montgomery Ward & Co, Inc,* 437 Mich. 627, 646;473 NW2d 268 (1991). Accordingly, we find that the trial court properly granted summary disposition of plaintiff's wrongful discharge claim pursuant to MCR 2.116(C)(10).

Plaintiff next claims that Raytheon discriminated against him on the basis of his gender by hiring a woman, defendant Joanne Saunders, rather than promoting him to the position of division president. The trial court found that plaintiff made a prima facie case of discrimination, but that Raytheon had articulated a legitimate nondiscriminatory reason for its hiring decision, which plaintiff failed to rebut as pretextual. See *Hazle v. Ford Motor Co,* 464 Mich. 456, 462-466;628 NW2d 515 (2001) (describing the applicable burden shifting analysis).

*3 Raytheon offered a number of nondiscriminatory reasons for its decision to hire Saunders, including her strong engineering background, her positive relationship with the company division's principal customer, and her willingness to relocate immediately to the company's location so that she would be available for the networking required to establish contacts that would ensure the division's

growth. Plaintiff failed to present evidence that any of these proffered reasons were pretextual. Plaintiff suggested that the company's executives lied in their deposition testimony when they attributed the hiring decision to the outgoing division president, and that this lie created a jury question whether the company's proffered reasons were pretextual. Plaintiff mischaracterized the testimony of the company executives, who never said that the hiring decision was solely the outgoing president's idea. The executives cited what they perceived as the outgoing president's lack of unqualified enthusiasm for plaintiff's candidacy, along with the president's sharing of their own assessments of various skills plaintiff needed to excel professionally, as factors among many in the hiring decision. Because, contrary to plaintiff's argument, we detect no "mendacious[ ]" testimony by the company's executives, we find that their testimony does not provide a basis for characterizing the company's proffered nondiscriminatory reasons as pretextual. Because no evidence of pretext exists, we conclude that the trial court correctly granted summary disposition of plaintiff's gender discrimination claim pursuant to MCR 2.116(C)(10).*Hazle, supra* at 465-466.

Affirmed.

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Not Reported in N.W.2d, 2002 WL 1040400 (Mich.App.)

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